RECORD AND BRIEFS

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No. 16-1363

In the Supreme Court of the United States

ELAINE C. DUKE, ACTING SECRETARY OF HOMELAND SECURITY, ET AL., PETITIONERS

v.

MONY PREAP, ET AL.

BRYAN WILCOX, ACTING FIELD OFFICE DIRECTOR, ET AL., PETITIONERS

v.

BASSAM YUSUF KHOURY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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The Ninth Circuit's ruling that a gap in custody exempts a criminal alien from mandatory detention warrants certiorari: The decisions below present an important question of federal statutory interpretation over which the circuits are divided. See Sup. Ct. R. 10(a).

First, respondents do not dispute that the Ninth Circuit opened a lopsided circuit conflict. Every other

[1] Elaine C. Duke is automatically substituted for her predecessor, John F. Kelly. See Sup. Ct. R. 35.3.

court of appeals to decide the issue has held that a criminal alien does *not* become exempt from mandatory detention when there is a gap in custody, even if the gap lasts several years. See *Lora* v. *Shanahan*, 804 F.3d 601, 611 (2d Cir. 2015), cert. denied, 136 S. Ct. 2494 (2016); *Olmos* v. *Holder*, 780 F.3d 1313, 1324-1327 (10th Cir. 2015); *Sylvain* v. *Attorney Gen. of U.S.*, 714 F.3d 150, 161 (3d Cir. 2013); *Hosh* v. *Lucero*, 680 F.3d 375, 382-384 (4th Cir. 2012); see also *Castañeda* v. *Souza*, 810 F.3d 15 (1st Cir. 2015) (en banc) (dividing evenly). Indeed, the Ninth Circuit recognized that four of its sister circuits had "sided with the government," but it squarely rejected that position. Pet. App. 4a.

Second, respondents do not dispute that these cases present a pure question of statutory interpretation. The only reason the court of appeals affirmed the injunctions in these two cases is because it interpreted 8 U.S.C. 1226(c) to render a criminal alien exempt from mandatory detention whenever the government fails to take him into immigration custody "promptly" after release from criminal custody. Pet. App. 3a, 27a-28a, 59a. If the Ninth Circuit had interpreted the statute the same way as its sister circuits, it would have reversed.

Third, respondents do not deny that this question has considerable practical importance. They contend (Br. in Opp. 17) that the extent of the importance is uncertain because "there is no factual record on which to assess the government's assertions about the practical implications of the court of appeals' ruling." But it does not require a factual record (or further factual development) to see that this case is important. The circuit conflict and the fact that respondents brought these two cases in the Ninth Circuit as class actions demonstrate that the issue is a broadly recurring one. Nor would further factual development regarding the extent to

which States and localities make it more difficult for the Department of Homeland Security (DHS) to take criminal aliens into custody "significantly advance [the Court's] ability to deal with the legal issue[] presented" or "aid" in its resolution. *Ohio Forestry Ass'n, Inc.* v. *Sierra Club*, 523 U.S. 726, 737 (1998) (citation omitted). Indeed, as the *Preap* respondents themselves put it in the district court, "the existence of state statutes and local ordinances that came into effect nearly two decades after Congress promulgated Section 1226 cannot logically affect what Congress intended the words of Section 1226(c) to mean." *Preap* D. Ct. Doc. 34, at 19 n.15 (Feb. 21, 2014). The *Preap* respondents further asserted that "[t]he difficulty of detaining noncitizens upon their release that the Government argues exists also has no bearing on statutory interpretation and whether the 'when . . . released' [clause] is ambiguous." *Ibid.* In any event, the record already includes evidence of state and local laws prohibiting compliance with detainer requests. See *Preap* D. Ct. Doc. 24, at 20-23 (Feb. 7, 2014). This Court has ample context to decide the meaning of Section 1226(c).

That issue is a pressing one. Removing criminal aliens has always been a top priority in immigration enforcement, and Congress enacted Section 1226(c) to prevent criminal aliens from potentially being released on bond and thereafter fleeing or committing further crimes. See Pet. 15-16. The decisions below nonetheless guarantee a bond hearing to every alien in the Ninth Circuit with the requisite criminal history, unless DHS takes the alien into custody promptly. And for every such alien in the Central District of California and the Western District of Washington, the injunctions here require bond hearings unless DHS takes them into custody "immediately," *id.* at 27a, 59a, although the

Ninth Circuit indicated that a "very short period" between release and detention may be permissible in certain circumstances, *id.* at 27a; see *id.* 23a ("some degree of immediacy"). Respondents do not deny that gaps in custody are inevitable because of resource constraints. The decisions below thus invite the very risk of recidivism and flight that Section 1226(c) is meant to prevent.

A. This Court's Review Is Warranted Now

In opposing certiorari, respondents primarily contend (Br. in Opp. 13-19) that review would be "premature." They contend, specifically, that (1) *Preap* is an appeal from a preliminary injunction, not a final injunction; (2) the House of Representatives has passed a bill that, if enacted into law, would reverse the Ninth Circuit's rule; (3) the Ninth Circuit has not definitively resolved the meaning of "promptly"; and (4) this Court is currently considering a different question about Section 1226(c) in *Jennings* v. *Rodriguez*, cert. granted, No. 15-1204 (oral argument scheduled for Oct. 3, 2017). These asserted reasons do not justify denying review.

1. The fact that *Preap* arises from a preliminary injunction does not warrant the denial of certiorari. There is nothing tentative, preliminary, or uncertain about the court of appeals' holding in *Preap* that a criminal alien becomes exempt from mandatory detention unless he is taken into immigration custody promptly. The court decisively resolved the question in the case, even concluding that the statute was "unambiguous[]," Pet. App. 5a, notwithstanding that four sister circuits and the Board of Immigration Appeals (BIA) had all reached a contrary conclusion. See *In re Rojas*, 23 I. & N. Dec. 117 (2001). The court also applied the *Preap* rule to affirm in *Khoury*, which arises from a permanent injunction following a grant of summary judgment to the

Khoury respondents. See Pet. App. 58a-59a. *Khoury* thus is not interlocutory at all.[2]

2. Respondents contend (Br. in Opp. 13-14) that the House of Representatives' passage of the No Sanctuary for Criminals Act, H.R. 3003, 115th Cong., 1st Sess. § 4(a)(3)(C) (2017), suggests that this Court's review is unwarranted. If enacted into law, that bill would reverse the Ninth Circuit's decisions by replacing "when the alien is released" in Section 1226(c) with "any time after the alien is released." *Ibid.* That bill thus indicates that the House is aware of the issue, disagrees with the proposition that a gap should exempt a criminal alien from mandatory detention, and has concluded that the issue is sufficiently important to justify reversal. But that bill is not limited to this one issue; it addresses a variety of issues relating to immigration enforcement and detention, and the interaction between the federal government and States and localities. For example, if enacted, it would also reverse the Ninth Circuit's decision in *Rodriguez*, currently under review in this Court. See *id.* § 4(a)(2) (addressing length of detention). And it is far from certain whether this bill will ever become law. Cf. *TC Heartland LLC* v. *Kraft Foods Grp. Brands LLC*, 137 S. Ct. 614 (2016) (No. 16-341) (granting certiorari notwithstanding pending bill to resolve the issue); Br. in Opp. at 29-30, *TC Heartland*, *supra* (No. 16-341). In the meantime, the Ninth Circuit's decisions have created a direct circuit conflict leading to disparate treatment of similarly situated aliens.

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[2] There is no merit to respondents' contention (Br. in Opp. 16 n.6) that *Khoury* does not warrant review because it is non-precedential. *Preap* is precedential, and the Ninth Circuit resolved *Khoury* (after final judgment) by applying *Preap*'s legal rule. Pet. App. 58a-59a.

3. There is no reason for this Court to wait for the Ninth Circuit to explicate further the term "promptly." The circuit conflict here is over whether a criminal alien becomes exempt from mandatory detention when there is a gap in custody. Four circuits say no; the Ninth Circuit says yes. Moreover, the circuits that have held that a gap is immaterial have reached that result in cases where the onset of custody clearly would not satisfy the Ninth Circuit's view of "promptly": the gap lasted multiple years. *Low*, 804 F.3d at 611; *Olmos*, 780 F.3d at 1324-1327; *Sylvain*, 714 F.3d at 161; *Hosh*, 680 F.3d at 382-384. The Ninth Circuit, by contrast, expressly rejected the position of its sister circuits and affirmed injunctions requiring immediacy. Pet. App 3a, 59a. The circuit conflict thus will persist regardless of how precisely the Ninth Circuit might ultimately define "promptly." The Ninth Circuit's gloss on "promptly" also would shed little light on the merits here, because that word does not appear in Section 1226(c).

4. The pendency of *Rodriguez* provides no basis for denying certiorari. The two cases present different questions about Section 1226(c), without material overlap. The question here is whether certain criminal aliens are exempt from mandatory detention. By contrast, *Rodriguez* addresses the question whether mandatory detention expires and a bond hearing is required after six months. See Gov't Br. at i, *Rodriguez*, *supra* (No. 15-1204). The *Rodriguez* issue thus only arises for aliens who were subject to mandatory detention in the first place. This case also focuses on specific statutory language that is not at issue in *Rodriguez*: the meaning

of "an alien described in paragraph (1)" and "when the alien is released." 8 U.S.C. 1226(c).[3]

B. The Ninth Circuit's Decisions Are Wrong

Respondents contend (Br. in Opp. 20-33) that the court of appeals' decisions below are correct, but those arguments are appropriately presented to this Court on plenary review. Indeed, even if the Ninth Circuit's decisions were correct, they would still warrant review because four circuits have adopted the opposite position. In any event, respondents' arguments lack merit.

1. Respondents incorrectly argue (Br. in Opp. 22-28) that Section 1226(c)'s plain language dictates their position. Paragraph (1) directs the Secretary of Homeland Security to take into custody any alien with the requisite criminal history, specified in four lettered subparagraphs, "when the alien is released." 8 U.S.C. 1226(c)(1). Paragraph (2) then prohibits the release of "an alien described in paragraph (1)." 8 U.S.C. 1226(c)(2). As the BIA explained in *Rojas*, "an alien described in paragraph (1)" is most naturally read to refer "to an alien described by one of four subparagraphs, (A) through (D)." 23 I. & N. Dec. at 121. Those subparagraphs describe individuals based on their own characteristics and conduct: their criminal history.

By contrast, the clause beginning "when *the alien* is released" does not describe who the alien is; rather, it takes as a given that "the alien" has already been described. 8 U.S.C. 1226(c)(1) (emphasis added). The "when the alien is released" clause instead specifies

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[3] If the Court concludes that the briefing and presentation of this case would benefit from a decision in *Rodriguez*, it could hold this petition and then grant certiorari after *Rodriguez* is decided. But that would provide no basis for denying review altogether.

when an act affecting such an alien should occur—when the Secretary should take the alien into custody.

Respondents have no real response. They elide the words "the alien" from the clause and assert (Br. in Opp. 32) that "[t]he "when . . . released" clause expressly describes *who* is subject to government action in the first place." But the full statutory text—"when the alien is released"—makes little sense unless the Secretary already knows who "the alien" is because he has already been fully described, and thus already knows who should be taken into custody in the first place.

Contrary to respondents' assertion (Br. in Opp. 23-24), reading "when the alien is released" to specify the situation in which the Secretary must take criminal aliens into custody does not render that phrase superfluous. Respondents ask, "when else could the [Secretary] take an alien into custody except when he or she is released?" *Id.* at 23 (quoting *Khodr* v. *Adduci*, 697 F. Supp. 2d 774, 779 (E.D. Mich. 2010)). The answer is that the Secretary otherwise could potentially take the alien into custody *before* he is released. For aliens who are in federal criminal custody, this provision ensures that they will complete their sentences before being transferred from one federal custodian to another. For aliens who are in state custody, this provision makes clear that the Secretary should not attempt to wrest them from state hands, and instead should wait for the coordinate sovereign to release them.

2. Even if "when the alien is released" imposes a deadline for the Secretary to act, the Secretary's failure to take a criminal alien into custody within that timeframe would not give the alien a windfall by making him

exempt from mandatory custody.[4] Rather, it would simply mean that the government missed the deadline. See *United States* v. *Montalvo-Murillo*, 495 U.S. 711, 717-720 (1990); see also *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 158 (2003).

Respondents contend (Br. in Opp. 31-33) that those cases are inapplicable here because DHS would not lose its authority to detain criminal aliens under the Ninth Circuit's interpretation: DHS would still have authority to detain them under 8 U.S.C. 1226(a), although it must provide them with a bond hearing and thus the criminal alien may ultimately be released. But respondents misapprehend the rationale of this Court's precedents. They reflect the common-sense point that when Congress has concluded that something is so important that it has affirmatively required the government to act by some deadline, this Court will assume (absent indication to the contrary) that it is better for the government to act late than never at all if the government misses the deadline. For example, the Court held in *Montalvo-Murillo* that "a provision that a detention hearing 'shall be held immediately upon the [detainee's] first appearance before the judicial officer' did not bar detention after a tardy hearing.'" *Barnhart*, 537 U.S. at 159 (brackets in original) (quoting *Montalvo-Murillo*, 495 U.S. at 714). This case is strikingly similar: Congress has mandated that custody of criminal aliens without bond shall begin "when the alien is released." 8 U.S.C. 1226(c)(1). If the government is tardy, detention is still mandatory.

It is no answer (Br. in Opp. 23-24) to suggest that, if the government is unable or fails to take a criminal alien

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[4] "When the alien is released" can also be read to mean "in the event the alien is released," and thus not to impose a deadline. See n.5, *infra*.

into custody immediately after release, the alien is exempt from mandatory custody but the government would still have authority to detain the alien *if it gives him a bond hearing* and the alien is denied bond. The point of Section 1226(c) is to eliminate bond hearings for criminal aliens. See *Demore* v. *Kim*, 538 U.S. 510, 520 (2003). The action that Congress mandated is mandatory custody, not discretionary custody.

Respondents are also wrong to claim (Br. in Opp. 32) that "when the alien is released" is both a deadline *and* a substantive limitation on the set of criminal aliens who must be detained. That is just another way of saying that the consequence of missing the deadline is that the alien becomes exempt from the mandate Congress imposed. That is precisely the argument this Court's decisions reject. *E.g.*, *Montalvo-Murillo*, 495 U.S. at 717 ("We reject the contention that if there has been a deviation from the time limits of the statute, the hearing necessarily is not one conducted 'pursuant to the provisions of subsection (f).'"). In any event, respondents' premise is wrong because "when the alien is released" specifies *when* DHS should begin detention, not *whom* it should detain.

3. At most, Section 1226(c) is ambiguous on this point. If so, the Court should defer to the BIA's decision in *Rojas* and reverse the Ninth Circuit. See *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-843 (1984). Contrary to respondents' contention (Br. in Opp. 29), the government's position is consistent with *Rojas*. *Rojas* holds that a criminal alien does not become exempt from mandatory custody if

there is a gap in custody. 23 I. & N. Dec. at 120. The government is advancing the same position here.[5]

Respondents contend that *Rojas* is "unmoored from the purposes and concerns" of the statute, because it is theoretically possible that a nearly 20-year gap could occur. Br. in Opp. 30 n.15 (citation omitted). But in *Rojas*, the BIA relied on not only Section 1226(c)'s text, but also its history, context, and purpose. Among other things, the BIA explained that "Congress was not simply concerned with detaining and removing aliens coming directly out of criminal custody; it was concerned with detaining and removing *all* criminal aliens." *Rojas*, 23 I. & N. Dec. at 122. And the BIA explained that respondents' interpretation creates practical problems. "It is difficult to conclude that Congress meant to premise the success of its mandatory detention scheme on the capacity of [DHS] to appear at the jailhouse door to take custody of an alien at the precise moment of release." *Id.* at 128. That practical point looms large here, because the injunctions in these cases exempt criminal aliens from mandatory detention if DHS does not take them into custody "immediately," Pet. App. 27a-28a, and the Ninth Circuit would at most permit a "very short" gap, *id.* at 27a. *Rojas* thus warrants deference, and is correct even without it.

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[5] Respondents note (Br. in Opp. 29-30) that the BIA did not interpret "when the alien is released" to mean "in the event the alien is released." But the government is not asking for deference to the BIA on that point, which is an alternative argument further illustrating that the Ninth Circuit's decisions are wrong. See Pet. 9 n.3. The principle of *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947), also does not apply here because these cases do not involve direct review of agency decisions; they are habeas corpus actions.

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For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

JEFFREY B. WALL
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AUGUST 2017